

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02—0569
Gross Retail and Use Tax—Adequate Documentation
Tax Administration—Penalty
For Tax Years 1999, 2000, 2001

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail and Use Tax—Adequate Documentation

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-7; IC § 6-8.1-5-4(a); 45 IAC 15-3-8; 45 IAC 2.2-2-1; 45 IAC 2.2-3-4

Taxpayer protests the proposed assessments of Indiana's use tax.

II. Tax Administration—Penalty

Authority: IC § 6-8.1-10-2.1; IC § 6-8.5-5-4(a); 45 IAC 15-11-2

Taxpayer protests the proposed assessment of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a heating and air conditioning contractor, selling and installing new heating and cooling systems pursuant to lump sum contracts. Because taxpayer failed to provide purchase invoices during the audit, the auditor could not verify that gross retail tax had been paid at the point of purchase; therefore, the auditor assessed use tax based on the best information available. Taxpayer then filed a protest, claiming documents were then available; the auditor was able to examine those documents and made some adjustments. However, taxpayer went forward with his protest. The remaining items at issue concern certain cash purchases for which taxpayer has no evidence he paid gross retail tax at the point of purchase. Additional facts will be added as necessary.

I. Gross Retail and Use Tax—Adequate Documentation

DISCUSSION

Taxpayer continues to protest the proposed assessment of Indiana use tax based on the best information available to the auditor at the time of the audit, and the 10% negligence penalty.

Taxpayer argued at the protest hearing that despite not having the evidence to show he paid gross retail tax, he did pay the tax on the cash purchases. Taxpayer claimed he did not mark up items after purchasing them, and that he did not keep his receipts, thinking that his cancelled checks would adequately fulfill his record-keeping responsibilities. Taxpayer during the tax years at issue was working full-time at another job, and starting up his own business with no accountant to help keep his books and records. Taxpayer admitted he thought his cancelled checks would be sufficient proof that he paid the state's gross retail tax at the point of purchase.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1. Pursuant to IC § 6-2.5-3-2, an "excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana is the property was acquired in a retail transaction." An exemption is provide in IC § 6-2.5-3-4 if "the property was acquired in a retail transaction and the state gross retail tax" was paid at the time of purchase. IC § 6-2.5-3-7 provides that a "person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;" therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4.

Indiana taxpayers have the duty and responsibility under IC § 6-8.1-5-4(a) to "keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." Taxpayer admitted he did not keep receipts from cash purchases. He is currently keeping the proper records and has an accountant now to keep him compliant and current with the Department's rules and regulations.

FINDING

Taxpayer's protest concerning the proposed assessments of Indiana's use tax is denied.

II. Tax Administration—Penalty

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty. Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to

reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer made certain efforts to keep records. He attempted to comply with IC § 6-8.5-5-4(a) by keeping track of cancelled checks. The audit showed him he was in error. This was taxpayer's first audit and he has taken steps to rectify his error. In the Department's view, taxpayer has set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Given the totality of the circumstances, waiver of the penalty is appropriate in this instance because taxpayer was not willfully negligent; he merely made a mistake.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is granted.